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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CORNELIUS M. WHALEN, T/A TOWSON ASSOCIATES LIMITED PARTNERSHIP, TO IT OWN USE AND TO THE USE OF ROBERT WHALEN CO., INC.,

Petitioners,

v.

FORD MOTOR CREDIT CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether F.R.C.P. 63, by explicitly permitting a deceased judge to be replaced after the return of a verdict, by "negative implication" prohibits a District Court from invoking the regulatory authority granted by F.R.C.P. 83 to replace a judge who has died during a trial before the return of a verdict.

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Petitioners Cornelius Whalen, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on 30 June 1982.

OPINION BELOW

The final opinion of the Court of Appeals for the Fourth Circuit, not yet reported, and rendered incident to the granting of a petition for rehearing *en banc*, is appended hereto at App. 1. The panel opinion of the Court of Appeals for the Fourth Circuit, not yet reported, is appended hereto at App. 28. The unreported interlocutory opinion of the United States District Court for the District of Maryland is appended hereto at App. 100. There is no final opinion by the District Court.

JURISDICTION

The Court of Appeals for the Fourth Circuit granted a rehearing *en banc* by order dated 10 February 1982. The final judgment of the Court was entered on 30 June 1982. This petition for writ of certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

Rules of Civil Procedure

"Rule 1. Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action." [28 U.S.C. App. at 394 (1976)]

"Rule 63. Disability of a Judge

If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or

findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial." [28 U.S.C. App. at 495 (1976)]

"Rule 83. Rules by District Courts

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." [28 U.S.C. App. at 519 (1976)]

STATEMENT OF THE CASE

On 10 December 1975, Towson Associates Limited Partnership ("Towson Associates"), the developer of a 27-story condominium building, filed this diversity action against Ford Motor Credit Company ("Ford Credit") for failure to comply with a commitment letter under which Ford Credit promised to provide "take-out" financing in the amount of $9,750,000 upon completion of the building. Ford Credit responded by contending that Towson Associates had failed to satisfy particular requisites appearing in the commitment letter.

Trial by jury commenced on 31 March 1980 in the United States District Court for the District of Maryland, with Judge C. Stanley Blair presiding. Judge Blair presided over the first three weeks of trial, during which time he ruled on all issues ultimately constituting the subject matter of Ford Credit's subsequent appeal (but for

the issue resulting from his own death). Shortly after having denied Ford Credit's motion for directed verdict, Judge Blair died. Ford Credit moved for a mistrial. Judge Murray, to whom the case had been reassigned, fully acquainted himself with the case (including the trial testimony), concluded that neither party would be prejudiced if the trial continued, and denied the motion. The trial continued for two additional weeks — after which the jury awarded Towson Associates damages in the amount of $4,294,746.00.

Ford Credit appealed, contending that because F.R.C.P. 63 sanctions the substitution of a trial judge (upon disability, death, etc.) "after a verdict is returned or findings of fact and conclusions of law are filed," the rule (by negative implication) prohibits such a substitution before verdict. Focusing on the legislative history of rule 63, as well as the traditional concept of the court as a continuing institution, the Court of Appeals, rejecting Ford Credit's analysis, affirmed the lower court in a decision to which Judge Francis D. Murnaghan filed a 78-page dissent. Fort Credit thereupon moved for, and was granted, a rehearing *en banc*.

In the Court's final opinion, five judges concluded that rule 63 impliedly prohibits the continuation of a civil trial by jury if the trial judge dies before a verdict is returned. Four judges, concluding that rule 63 simply does not speak to "before verdict" substitution, held that F.R.C.P. 83 empowers a trial judge to effect a substitution before verdict in the exercise of sound discretion. The decisive vote was issued by Chief Judge Harrision L. Winter in a concurring opinion. Stating that but for the "unseemliness" of having an equally divided court, he could have been readily persuaded to adopt the analysis of the four-member dissenting opinion written by Judge Butzner, Chief Judge Winter wrote:

"As the opinions of Judge Murnaghan and Judge Butzner fully expose, the legal issue raised by the death of Judge Blair during the course of the trial and the substitution of Judge Murray is a close one. Except for the unseemliness in this case, and the uncertainty in future litigation, of having this issue decided by an equally divided court, I could readily be persuaded to adopt the views espoused by Judge Butzner. Although the framers of Rule 63 and the Congress which approved it may not have intended that it apply in the situation which faces us, I have difficulty reading into it an implicit prohibition which would limit the far-reaching power to do justice vested in the district court by the last sentence of Rule 83. At the same time I recognize that the courts which have dealt with the problem of the death of the trial judge in the course of a non-jury civil trial have uniformly held that a new trial is mandated. To my mind, a jury trial should be treated differently; but if a majority of our court is unwilling to recognize the distinction, I do not think that I should cast my vote in a way rendering this court powerless to act." [App. 15]

From this inconclusive resolution of the critical issue presented, lies the instant petition.

REASONS FOR GRANTING THE WRIT

IN HOLDING THAT F.R.C.P. 63 PROHIBITS THE SUBSTITUTION OF A TRIAL JUDGE (UPON HIS DEATH) BEFORE VERDICT, THE FOURTH CIRCUIT HAS IGNORED THE LEGISLATIVE HISTORY AND LITERAL LANGUAGE OF THE RULE, HAS REPRESSIVELY CONSTRUED THE RULE IN VIOLATION OF F.R.C.P. 1, AND HAS ERRONEOUSLY NULLIFIED APPLICATION OF F.R.C.P. 63, THEREBY CREATING A SERIOUS IMPEDIMENT TO THE EFFICIENT ADMINISTRATION OF THE CIVIL JURY TRIAL.

By granting a rehearing *en banc*, the Court of Appeals for the Fourth Circuit recognized that the issue of first impression presented by this case is one of exceptional importance. Yet after 99 pages of appellate analysis, an analytically divided Court has failed to resolve the issue.

Indeed, as can be gleaned from Chief Judge Winter's concurring opinion, because the Court's holding proffers a severely impractical result in need of corrective action, the importance of the issue in this case has been increased.[1] In words which should introduce the issue in a case, rather than summarize its attempted disposition, Chief Judge Winter stated:

> "More is at stake than just this case. With the proliferation of the federal judiciary and the increased tensions under which all judges live, there is a great risk that our dilemma will recur." [App. 15]

The dilemma to which Judge Winter refers is not one created by the Federal Rules. It is one of the Court's own making. Setting a dangerously strained and repressive precedent extending well beyond the subject matter of this case, the Court has held that "Rule 63 communicates a *positive prohibition* on substitution of a judge prior to verdict. . . ." [App. 13 (emphasis supplied)] As reflected by the dissenting opinion, however, neither the legislative history,[2] nor the literal language of the rule sanctions this interpretation. Exclusively addressing the matter of substitution at that point in time "after a verdict is returned," the rule simply does not speak to the

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[1] Addressing the result of the majority opinion with which he reluctantly concurred, Chief Judge Winter stated that "[f]rom this case one thing clearly emerges and that is the need for further revision of Rule 63 . . . ." [App. 15] Judge Winter continues by stating that it is his "hope" that appropriate committees and bodies will "soon address the problem." [App. 15] Because the result reached by the majority may not inspire legislative revision, and because the uncertain and lengthy process of legislative revision is unnecessary once it is recognized that Judge Murnaghan's opinion has misconstrued rule 63, corrective action by this Court is singularly appropriate.

[2] The genesis of rule 63 clearly reflects that it was never meant to forbid (by negative implication or otherwise) the substitution of a trial judge *before* the return of a jury verdict in a civil trial. The evolutionary history of the rule begins with section 953 of the Revised Statutes, enacted in 1872, which

matter of substitution before verdict.[3] In finding to the contrary, the majority opinion yields an oppressive result affronting the spirit of the Federal Rules.

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section provided for the authentification of a bill of exceptions by the judge of the court in which the cause was tried. In *Malony v. Adsit*, 175 U.S. 281, 285 (1899), the Court held that this section required "that no bill of exceptions can be deemed sufficiently authenticated unless signed by the judge who sat at the trial." By Act of 5 June 1900 (28 U.S.C. former § 776), Congress changed the result of *Malony* by permitting a substituted judge to rule on a motion for new trial or an application for allowance of a bill of exceptions. Rule 63 superceded former section 776, simply extending the express scope of coverage "to include all duties to be performed by the judge after verdict or judgment." *Notes of Advisory Committee on Rules*. Extensive legislative research has failed to yield any facts suggesting a consideration of substitution before verdict.

In this case, the majority opinion relied upon subsequent legislative history and informal committee papers. Such reliance is ill placed in light of (1) the fact that the Judicial Conference has made it clear that these informal papers are not to be used for litigation purposes, (2) this Court's statement in *Consumer Product Safety Commission v. GTE Sylvania Inc.*, 447 U.S. 102, 118 (1980) that "less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment," and perhaps more importantly, (3) the fact that "[t]he discussions and letters that are quoted to support Ford's position did not deal with the present issue. They dealt solely with bench trials and the death of a judge before he filed findings of fact." [App. 19 (dissenting opinion)] Ironically, a full review of the informal discussions and letters relied upon by the majority in fact supports Towson Associates.

[3] Although F.R.C.P. 63 does not address "before verdict" substitution, F.R.Cr.P. 25 does — explicitly permitting same when a trial judge dies during the course of a jury trial. The strained nature of the majority opinion is all the more apparent when it is recognized that "[t]here are neither logical nor pragmatic reasons for allowing a criminal jury trial, involving the liberty and reputation of a person, to go forward after the death of the trial judge while a civil jury trial, involving lesser stakes, must inevitably grind to a halt though neither party would be prejudiced by substitution." [App. 23-24 (dissenting opinion)].

"The rules have for their primary purpose the securing of speedy and inexpensive justice in a uniform and well-ordered manner." WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1029 at 127 n.84 (1969) (hereinafter cited as WRIGHT & MILLER). To this end, F.R.C.P. 1 states that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action." "There probably is no provision in the Federal Rules that is more important than this mandate." WRIGHT & MILLER, *supra*, § 1029 at 127. Consistent with this mandate, "[t]he Federal Rules grant discretionary power to the Court in many instances, and distributed throughout the Rules are provisions for the instruction and guidance of the Court in the exercise of its discretion." 2 MOORE'S FEDERAL PRACTICE ¶ 1.13 [1] at 281 (1982). One such granting of discretionary powers is contained in F.R.C.P. 83, which states in relevant part that "district courts may regulate their practice in any manner not inconsistent with these rules." Rule 83 should be applied in this case to sanction the substitution that occurred upon Judge Blair's death.[4] By holding that rule 63 "positively prohibits" a substitution before verdict, the majority opinion has foreclosed this practical result.

Failing to recognize the interplay between rules 1, 63 and 83, the majority opinion emerges as a dangerous

[4] *Cf., Colgrove v. Battin*, 413 U.S. 149 (1973). In *Colgrove*, the Court considered whether F.R.C.P. 48, which states that "parties may stipulate that the jury shall consist of any number less than twelve," prohibited (by negative implication) a local district rule providing for a jury of six in the absence of a stipulation. Noting that the draftsmen of rule 48 assumed "trial by jury" means "a jury of twelve," the Court stated that this assumption "cannot be transmuted into an implied direction to impanel juries of 12 without regard to whether a jury of 12 was required by the Seventh Amendment." [413 U.S. at 163] The Court thereby held that the local rule was not inconsistent with rule 48, and hence, the local rule was deemed valid pursuant to rule 83.

precedent wielding a medieval ax to the pragmatic foundation upon which the rules are to rest. The death of a trial judge during the course of a complex and lengthy civil jury trial is an unfortunate, but not rare, event. At such time, after both parties may have expended months at trial, or after one party may have presented a case likely to result in victory, it is uneconomical, illogical and simply unfair for one party to be able to unilaterally secure a new trial. Consistent with the liberal mandate of construction required by rule 1, and the pragmatic administration of justice permitted by rule 83, no construction of rule 63 should yield such an untoward conclusion.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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